

LEGAL REVIEW NOTE

Bill No: HB139

LC#: LC1187, To Legal Review Copy, as of December 6

Short Title: Generally revise disclosures on the face of campaign material

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Date: December 13, 2018

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

LC1187, as drafted, may raise potential constitutional concerns associated with the First Amendment to the U.S. Constitution as incorporated against the states by the Fourteenth Amendment. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

LC1187 revises section 13-35-225(3), MCA. This subsection concerns vote-reporting requirements for printed election material, and several versions of this subsection have been challenged and found constitutionally lacking. Each time the section has been challenged, the Court has struck down the implementation of this section.

An earlier version of this subsection required printed election material that discussed a candidate's voting record to include on the face of the material (or, if the face of the material was too small to fit the required disclosures, the information had to be sent to the Commissioner of Political Practices) a reference to the particular vote on which the information was based, a disclosure of contrasting votes known to have been made by the candidate "on the same issue if closely related in time", and a signed statement that the statements about the other candidate's voting record were true and accurate. Section 13-35-225(3), MCA (2003).

In *Lair v. Murry*, plaintiffs alleged the section was unconstitutionally vague, overbroad, and failed strict scrutiny. 817 F. Supp. 2d 1058 (D. Mont. 2012). The Court agreed, finding the phrases "closely related in time" and the "same issue" to be unconstitutionally vague. *Id.*

Following this case, the Legislature revised the vote-reporting statute by substituting "the same issue if the contrasting votes were made in any of the previous 6 years" for "the same issue if closely related in time". Section 13-35-225(3), MCA (2013). This did not address the Court's determination of unconstitutional vagueness concerning the term "the same issue", and after plaintiffs brought another suit challenging the section, the District Court again permanently enjoined the statute. *Montforton v. Motl*, 2014 U.S. Dist. LEXIS 190170 (D. Mont. 2014).

In a third amendment, the Legislature substituted "all votes made by the candidate on the same legislative bill or enactment" for "contrasting votes known to have been made by the candidate on the same issue if the contrasting votes were made in any of the previous 6 years". Section 13-35-225(3), MCA (2015).

Plaintiffs again challenged the vote-reporting statute under the First Amendment in *Natl. Assn. for Gun Rights v. Motl*, 188 F. Supp. 3d 1020 (D. Mont. 2016). In granting a preliminary injunction, the federal District Court determined that this subsection prescribed speech based on the topic discussed or the idea or message expressed. *Id.* at 1034-1035. Being a content-based restriction, it was "presumptively invalid". *Id.* (citation omitted). The Court noted that content-based restrictions are subject to strict scrutiny, stating that a "law survives strict scrutiny only if it is narrowly tailored to a compelling state interest." *Id.* (citations omitted). The District Court rejected the state's argument that because the disclosures provided information to the voters, they were subject to the lesser standard of "exacting scrutiny." *Id.* at 1034.

Although the Court noted that providing accurate information to voters was "an important interest" and it "[might] well be compelling", the Court found that the "means employed by this statute are not narrowly tailored to achieve this goal." *Id.* at 1035. The Court went on to say:

This finding is anchored primarily in the Court's concerns about the accessibility of this information to the voter. . . . Ironically, speakers would have to mail this

information to the COPP's office in Helena, Montana, even though it was unclear how the voter would actually access this information. For a system with a stated purpose of providing information to the voter, the Court finds that it does not do it well. This is in addition to the fact that access to this information already exists through a publicly supported website. The Montana Legislature, *Bills*, <http://leg.mt.gov/css/Default.asp> (accessed May 19, 2016), see also *United States v. Alvarez*, 132 S. Ct. 2537, 2551, 183 L. Ed. 2d 574 (2012) (finding that a statute regulating speech was not necessary when an internet database provided an alternative means to regulation).

Id. The Court further noted that, “the focus of this statute is to provide information to the voters. However, this information is not secret and is publicly available to the electorate.” *Id.* at 1036. The Court then granted a preliminary injunction enjoining the enforcement of 13-35-225(3). *Id.*

The next year, finding that it violated the First Amendment, the Court granted a permanent injunction after the defendants declined to defend the challenge. *Natl. Assn. for Gun Rights v. Motl*, 279 F. Supp. 3d 1100 (D. Mont. 2017).

As drafted, LC1187 requires certain disclosures, including publicly available information, to be placed on the face of political advertisements under a content-based restriction. Like previous versions of the vote-reporting statute, this draft requires certain information to be disclosed on the face of the election material based on the content of the that election material or, if the printed election material is too small for the requirements, the information must be sent to the Commissioner of Political Practices to be put on file. Similar to the previous versions, the disclosure concerns a candidate's voting record which is publicly available through the Montana Legislature's website. As discussed by the District Court in *Natl. Assn. for Gun Rights v. Motl*, 279 F. Supp. 3d 1100, and under the *Alvarez* standard as cited by the District Court (above), this draft may raise potential questions about whether it conforms with the First Amendment of the U.S. Constitution.

Requester Comments:

Response to Legal Review Note for HB 139 - Rep. Kimberly Dudik

The Legal Review Note is not accurate because it does not adequately contemplate the new language included in the proposed bill. HB 139 is valid as written because it does not contain the language and requirements that were previously found unenforceable.

HB 139 strikes the provision of Montana code, 13-35-225(3), MCA, that was previously found unenforceable and substitutes new language that fully incorporates what the courts have stated is required so that the bill is not found constitutionally lacking.

The First Amendment to the U.S. Constitution is satisfied. The bill provides what the court will say is a content-based restriction because it is based on a topic (campaign disclosures). This type of restriction is subject to strict scrutiny and only enforceable if it is narrowly tailored to a compelling state interest.

The proposed bill is narrowly tailored to a compelling state interest. The bill provides information that an individual will not otherwise know – what the vote count or statement made on a campaign mailer is based on. No alternate means exists to provide find this information. No database exists that will provide the link to the underlying basis of this factual information – the information must be provided by the person or entity making a claim.

The compelling state interest being protected is clearly provided for in the proposed statutory section: so that citizens will know what vote is referenced in the communication or what information the statement made is based on.

This bill does not include the portions previously found unenforceable. All votes taken on a bill or on an “issue” are not required. Here is a summary of the old versions and the unenforceable requirements that are not included in this version:

2003 Version

- The requirement in the 13-35-225(3), MCA, 2003 version for including on the face of the material a reference to the particular vote on which the information was based and disclosure of contrasting votes known to have been made by the candidate "on the same issue if closely related in time" is not included *Lair v. Murry*, 817 F. Supp. 2d 1058 (D. Mont. 2012).
- Likewise, a signed statement that the statements about the other candidate's voting record were true and accurate is not required as was in the 2003 version.

2013 Version

- The 2013 version required including on the face of the material a reference to the particular vote on which the information was based and disclosure of contrasting votes known to have been made by the candidate on "the same issue if the contrasting votes were made in any of the previous 6 years" Section 13-35-225(3), MCA (2013).
- The section was found unenforceable because this requirement of disclosing all votes on “the same issue” was still included. *Montforton v. Motl*, 2014 U.S. Dist. LEXIS 190170 (D. Mont. 2014). The proposed bill does not require disclosure of votes on the “same issue” or for the “previous 6 years.”

2015 Version

()The 2015 version required disclosure of "all votes made by the candidate on the same legislative bill or enactment". Section 13- 35-225(3), MCA (2015).

()This was unenforceable because it restricted speech (as a content-based restriction) and did not meet the legal threshold of being narrowly tailored to a compelling state interest. *First Amendment in Natl. Assn. for Gun Rights v. Motl*, 188 F. Supp. 3d 1020, 1034-35 (D. Mont. 2016).

()The court acknowledged providing accurate information to voters is an important, maybe even compelling, state interest but the statute must be narrowly tailored to achieve this goal. The 2015 version was not narrowly tailored because the information regarding all votes a candidate made

on the same issue was already publicly available on the Montana Legislature bill website.
<http://leg.mt.gov/css/Default.asp>.

()The case *United States v. Alvarez*, 132 S. Ct. 2537, 2551, 183 L. Ed. 2d 574 (2012) is not applicable to the proposed statute, even though it is cited in the Legal Review Note. That case dealt with a situation in which an individual lied about receiving a Congressional Medal of Honor and was prosecuted under the Stolen Valor Act because of this lie. The Act's purpose was maintaining the integrity and purpose of the Medals. The Stolen Valor Act was found unenforceable because it restricted the individual's speech and people could look at an internet database list of Congressional Medal of Honor recipients to see who won them. Thus the Act was unnecessary and unenforceable. A similar internet database or compilation of information does not exist to tell an individual what vote or prior statement a person is talking about.